



December 9, 1999

ML-GM696

Mr. Gregory Green, Director
Vehicle Programs and Compliance Division
U.S. Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105

Dear Mr. Green:

Subject: On-Board Diagnostics (OBD) Service Information Rulemaking

General Motors (GM) supports the comments made by the Alliance of Automobile Manufacturers (the Alliance) in their October 15, 1999 letter concerning EPA's draft outline service information NPRM. In addition, GM offers the following comments to further amplify our concerns.

GM has been an active participant in the discussions of the upcoming service information NPRM. In the context of these ongoing discussions, we think that the Alliance's October 15 letter will prove quite helpful, and we hope these further remarks will also prove to be of assistance.

The comments below focus on three specific areas of considerable importance to GM: (1) regulation of manufacturer service information disclosure through World Wide Web sites; (2) use of the Equipment and Tool Institute (ETI) as a central repository for automotive service information; and (3) aftermarket scan tool diagnostic functionality on GM vehicles with OBD II systems. We hope to continue our discussions with EPA on all three of these important issues as the service information rulemaking progresses.

EPA Regulation of Web Sites

The Web sites that GM and other manufacturers will use to provide service information are strategic business tools. They are also the focus of significant commercial speech activity, as conduits through which manufacturers communicate with customers and key business partners. Nevertheless, there have been preliminary discussions regarding the possibility of intrusive EPA regulation of the design and/or performance of manufacturer service information Web sites.

We at GM believe that EPA should take care not to impose any direct regulations in this highly sensitive area. We certainly agree that EPA can and should ask that service information be made available in electronic format and at reasonable cost. But any effort to prescribe the means by which that information is conveyed, including specifying requirements for Web site design or performance, carries two great risks.

First, it hardly needs to be said that the World Wide Web is a quickly evolving mass communications medium. To use this medium to best advantage, manufacturers must have the flexibility to adapt to its rapid and unpredictable evolution. Fixed regulatory requirements, which by definition could not hope to evolve in tandem with the Web itself, would severely hamper this adaptation process.

Second, it is my understanding that proposed regulations addressing Internet content and Web site design and performance would very likely bog this rulemaking down in the intricate legal issues presented by any government attempt to regulate corporate or commercial speech. (Please refer to the attached white paper.)

To avoid the policy and legal risks of direct regulation of Web site design and performance, GM would propose a consultative process modeled on the cooperative "Arizona Pilot Program" that we have described in some of our past discussions with you. Through such a process, EPA could assure itself that competitive business pressures were effectively inducing manufacturers to provide easy access to such information by making it available on the Web and other conduits of e-commerce. EPA could also participate in the process by which manufacturers and service repair technicians identify and correct problems with access to specific manufacturer information. GM would like to work with EPA and the Alliance in the coming months to design and implement such a consultative, advisory process.

ETI as a Central Collection Site

GM for many years allowed ETI to access many forms of technical service information, including technical and product forums and direct access to GM subject matter experts. Then in 1995, GM initiated a bold and innovative approach to improving the delivery of its service information. Under this new approach, model year 1996 and later GM Serial Data Stream Information is made available directly to the ETI member companies who request access to it. The rights to use this information are conveyed through individual GM licenses.

In light of these initiatives and GM's strong commitment to continuing its direct support to the automotive service industry, GM would strongly oppose any regulatory agency attempts to require disclosure of information to ETI. We are aware, of course, that some other automobile companies provide information in electronic format to ETI. Nevertheless, we believe that any regulatory requirement that manufacturers provide their data in electronic form to ETI, or any other vendor of information over secure Web sites, is unwarranted. I note in this connection that the Clean Air Act compels the disclosure of service information only to "any person engaged in the repairing of motor vehicles or motor vehicle engines." It says nothing about centralized vendors selling information over secure Web sites, such as the Equipment and Tool Institute.

Aftermarket Scan Tool Functionality

Since 1995, GM has made the GM Serial Data Stream Information available to all of its licensees in the aftermarket scan tool business. Nonetheless, none of these aftermarket tool companies have, to date, designed and provided the same level of OBD II diagnostic capability or functionality as is available in the GM Tech2 diagnostic tool provided to GM dealerships. Accordingly, also since 1995, GM has provided the “Tech2 Flash” diagnostic tool to independent service technicians. The Tech2 Flash is a handheld tool, distributed through OTC Tool Company and Mack Tools, that has identical functions and features to the Tech2 used in GM dealerships.

GM’s decision to provide both enhanced Data Stream Information and the Tech2 Flash is just one example of many in which information above and beyond that required by EPA is being provided to independent service technicians. We at GM believe that the willingness by the automobile industry in general, and GM in particular, to go beyond the letter of the law should be viewed favorably by EPA in this rulemaking. In our view, it clearly demonstrates that competitive incentives and sound business sense can be relied on to get independent service technicians the information they need, without reliance on anything approaching intrusive command-and-control regulation.

I hope that these comments will prove helpful as you and your colleagues move forward with the service information rulemaking. If you would like to discuss any of these issues, please call me at 248-685-5007 or David H. Ferris at 248-857-1967.

Sincerely,

Robert F. Wiltse, Director
GMPT Compliance and Certification

Attachment

cc: H. Pugliese, EPA Ann Arbor

EPA REGULATION OF WORLDWIDE WEB SERVICE INFORMATION SITES

Preliminary Legal Analysis

The Environmental Protection Agency (“EPA”) is considering the imposition of internet site content standards for automobile manufacturers. These standards could take the form of mandates on the form, structure, and content of manufacturer internet sites for the posting of information relating to the service and repair of emissions control equipment. While EPA likely has authority under the Clean Air Act to mandate disclosure of certain technical information relating to emissions control equipment, a proposal of the nature of those now being considered raises serious freedom-of-speech concerns under the First Amendment to the United States Constitution.

There is no question that the publication and dissemination of information over the internet is protected speech under the First Amendment. The Supreme Court ruled in 1997 that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to” the internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). That automobile manufacturers’ websites are used, *inter alia*, to advertise and promote their products, does not remove them from First Amendment protection. Even in the context of commercial speech, “the government bears the burden of identifying a substantial interest and justifying the challenged restriction.” *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 119 S.Ct. 1923, 1930 (1999). *See also Central Hudson Gas & Elec. Corp. v. Public Svc. Comm’n of N.Y.*, 447 U.S. 557 (1980).

The fact that EPA may intend to compel the disclosure of “facts” relating to service information, rather than opinion, does not exempt its mandates from First Amendment scrutiny. *Riley v. National Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 798-99 (1988). “Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,” and therefore such requirements are closely scrutinized under doctrines applied to as “content-based regulation of speech.” *Id.* at 795. Under such scrutiny, manufacturers cannot be compelled to disclose information absent, at the very least, “some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern.” *International Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Moreover, “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate factual statement.” *Id.*

Disclosure requirements have been upheld to prevent consumer deception or to advance other substantial governmental interest. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (upholding state requirements on disclosures in attorney advertising); *Meese v. Keene*, 481 U.S. 465 (1987) (upholding “political propaganda” labeling requirement for films). But the mandates now under consideration by EPA may go far beyond a simple requirement for disclosure of some kind. Instead, the mandates EPA is considering could place the agency in a position to oversee the form and content of manufacturers’ websites. Such regulations would very likely constitute an impermissible restriction on speech, especially since in the context of commercial speech, the Court has noted that the constitutionality of disclosure requirements is, in part, a function of the burden that they impose upon the regulated speaker.

For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court noted that “unduly burdensome disclosure requirements might offend the First Amendment” and that constitutional disclosure requirements must be “reasonably related to the State’s interest in preventing deception of consumers.” *Id.* at 651.

Pervasive or intrusive EPA regulation of automobile manufacturers’ websites would run afoul of the First Amendment. It is therefore appropriate for EPA to address these concerns through a voluntary consultation process instead of through formal regulations.